

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2003-CR

Cir. Ct. No. 2004CF291

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUSTIN T. SONNENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dustin Sonnenberg appeals a judgment of conviction ordering him to pay \$5,440.60 in restitution and an order denying his postconviction motion challenging the restitution award. He argues his counsel

was ineffective for failing to contest the amount of restitution. We disagree and affirm the judgment and order.

FACTS

¶2 On September 20, 2005, Sonnenberg pled guilty to intentionally taking and driving a vehicle without the owner's consent, as a habitual criminal. The charge stemmed from an incident in which Sonnenberg took a vehicle from the owner's driveway. Before police could recover it, the vehicle was involved in an accident while being driven by a different person with Sonnenberg's permission. The vehicle was a total loss.

¶3 The stolen vehicle was a 1992 Buick Park Avenue. At Sonnenberg's sentencing, the prosecution submitted with a letter from the victim's insurance company an attached computer printout indicating the Kelley Blue Book retail value of the Buick was \$4,735. Sonnenberg's counsel argued Sonnenberg should not be required to pay the value of the Buick at all because he was not the person who had crashed it; however, counsel did not contest the value of the Buick as reported by the prosecution or request a restitution hearing. The court ordered Sonnenberg to pay restitution of \$5,440.60, which included \$4,735 for the loss of the Buick.

¶4 Sonnenberg then filed a postconviction motion. He alleged his attorney was ineffective for failing to contest the amount of restitution. He argued the Kelley Blue Book retail value of the Buick was simply a "dealer's retail negotiation beginning point" and the actual replacement value of the Buick was likely lower. He provided his own Kelley Blue Book printouts indicating that the private party value of the Buick, as of May 7, 2006, was no more than \$2,835, and

a police report in which the victim had estimated the Buick's value at the time of the theft as \$3,000.

¶5 At the *Machner*¹ hearing, Sonnenberg's trial counsel stated she was aware banks and insurance companies routinely used the Kelley Blue Book to value vehicles, and she chose instead to contest whether Sonnenberg should be responsible for the loss of the vehicle at all. Trial counsel did not remember any conversation with Sonnenberg regarding contesting the restitution amount; however, Sonnenberg testified counsel told him she thought the court would not lower the restitution amount if she raised the issue.

¶6 The court denied Sonnenberg's motion. The court concluded Sonnenberg's counsel chose the stronger legal argument when she argued Sonnenberg should not be responsible at all. In addition, the court concluded there was no prejudice to Sonnenberg because the damage to the car in the accident made it necessary to rely on a source like the Blue Book rather than making an individualized valuation of the specific car in question.

DISCUSSION

¶7 We review ineffective assistance claims as a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990). We will uphold the circuit court's findings of fact unless clearly erroneous. *Id.* However, whether a given set of facts amount to ineffective assistance is a question of law reviewed without deference to the circuit court. *Id.*

¹ See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶8 To prove ineffective assistance, a defendant must prove both that counsel’s performance was deficient and that counsel’s deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. To show deficient performance, a defendant must prove that even when viewed from the trial counsel’s perspective, counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687; *Johnson*, 153 Wis. 2d at 127.

¶9 Sonnenberg argues his trial counsel was deficient² because she failed to challenge the Blue Book estimate. He argues the victim would have had the burden of proving the value of the car, and therefore any arguments that the accident made the car difficult to value work in his favor.

¶10 We disagree. Had a restitution hearing been held, the victim would have only had to show the replacement cost of the Buick, not its precise value at the time it was stolen. *See* WIS. STAT. § 973.20(2)(b).³ The Kelley Blue Book retail value—a typical car dealer’s asking price for a vehicle with the same features as the Buick—was convincing evidence of the replacement value of the Buick. In view of that fact, counsel’s decision to focus on whether restitution was owed at all rather than contesting the Kelley Blue Book value was entirely reasonable.

² Throughout his brief, Sonnenberg repeatedly refers to trial counsel as “incompetent.” It is not clear whether Sonnenberg is using the term “incompetent” as a synonym for deficient performance or simply as a disparaging epithet. If the latter, his use of the term is unprofessional. In either case, his accusation is unfounded.

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶11 To show prejudice, a defendant must demonstrate “a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *State v. Guerard*, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

¶12 Sonnenberg argues a substantially lower value for the car would have been ordered had a restitution hearing been held. In support of his position, Sonnenberg relies on his own Blue Book estimates and the victim’s statements in police reports estimating the value of the Buick at \$3,000.

¶13 However, the evidence Sonnenberg relies on is at best tangentially related to the true replacement value of the Buick. Sonnenberg’s proffered Blue Book estimates give the Buick’s value as of May 2006, over two years after the theft took place. They also list the amount a private seller would be expected to charge, not the amount the victim would have had to pay in order to purchase a similar vehicle from a dealer. Sonnenberg’s estimates therefore shed little light on what a proper restitution amount would have been. In addition, we agree with the circuit court’s conclusion that the victim’s impromptu estimates to police were much less accurate than the Blue Book estimate submitted by the prosecution. We therefore conclude Sonnenberg has failed to show a reasonable likelihood that a restitution hearing would have led to a different result.

By the Court—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

